Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(NCVC)-1488–09 OF 2015
ALIZATUL KHAIR, NALLINI PATHMANATHAN AND ZABARIAH MOHD YUSOF JJCA
28 JANUARY 2017

Civil Procedure — Striking out — Application to strike out writ and statement of claim — Respondents brought action against appellant — Appellant applied to strike out respondents' writ and statement of claim pursuant to O 18 r 19(1)(b), (c) and/or (d) of the Rules of Court 2012 — Whether first respondent had capacity and locus standi to institute action — Whether respondents estopped from pursuing action because of res judicata or absolute estoppel — Rules of Court 2012 O 18 r 19(1)(b), (c) and/or (d)

The first respondent was appointed by Pembinaan BLT Sdn Bhd ('Pembinaan BLT') as the main contractor for the construction of a Royal Marine base at Tanjung Pelepas, Johor Bahru, Johor. For the purpose of financing the project, the first respondent obtained banking facilities from the appellant. Pursuant to the banking facilities, the first respondent applied to the appellant to pay the first respondent's subcontractor, Forest Point Sdn Bhd ('Forest Point') the sum of RM250,000 directly but the appellant failed to do so. Due to the non-payment, the first respondent was wound up by Forest Point. Consequently, Pembinaan BLT terminated the first respondent as the main contractor for the project and at the same time, the appellant also terminated the banking facilities which were granted to the first respondent. The appellant had obtained judgment for a guarantee action ('the guarantee action') against the second to fourth respondents and subsequently proceeded with bankruptcy action. The respondents had also filed an action against appellant ('Suit 207') and in response, the appellant filed a notice of application to strike out the respondents' writ and statement of claim pursuant to O 18 r 19(1)(b), (c) and/or (d) of the Rules of Court 2012. The High Court dismissed the notice of application by the appellant, hence the present appeal. The issues raised by the appellant were whether the first respondent had the capacity and locus standi to institute the action; and whether the respondents were estopped from pursuing Suit 207 because of res judicata or absolute estoppel.

Held, allowing the appeal with costs:

(1) When the writ and the statement of claim was filed on 23 February 2011 in Suit 207, there was no sanction obtained by the first respondent. Sanction was only obtained on 3 June 2015, post filing of the writ and statement of claim. In view of the fact that the sanction was only obtained after the suit had been filed, the first respondent had no capacity to institute Suit 207. The sanction obtained after the filing of Suit 207 could not be made retrospective (see paras 27, 34 & 48).

(2) The statement of claim in both the guarantee action and Suit 207 disclosed that: (a) both consisted of the same series of facts; (b) the guarantee action was determined after a full trial based on its merits after witnesses gave evidence; (c) the parties in the guarantee action were the same as in Suit 207; and (d) the issues and subject matter raised in Suit 207 had been raised and considered in the guarantee action. The factual matrix of Suit 207 and the guarantee action showed a plain and clear case of multiplicity of actions, which was an abuse of the court's process. The filing of Suit 207 attracted the maxim of res judicata. In totality, Suit 207 was frivolous and an abuse of the court's process and was therefore unsustainable and should therefore be struck out (see paras 40, 43 & 49–50).

[Bahasa Malaysia summary

Responden dilantik oleh Pembinaan BLT Sdn Bhd ('Pembinaan BLT') sebagai kontraktor utama bagi pembinaan pengkalan Marin DiRaja di Tanjung Pelepas, Johor Bahru, Johor. Bagi tujuan pembiayaan projek, responden pertama memperolehi kemudahan perbankan daripada perayu. Berikutan kemudahan perbankan, responden pertama memohon kepada perayu untuk membayar subkontraktor responden pertama, Forest Point Sdn Bhd ('Forest Point') wang sejumlah RM250,000 secara langsung tetapi perayu gagal berbuat sedemikian. Oleh kerana tidak bayar, responden pertama telah digulung oleh Forest Point. Akibatnya, Pembinaan BLT menamatkan perkhidmatan responden pertama sebagai kontraktor utama bagi projek tersebut dan pada masa yang sama, perayu juga menamatkan kemudahan perbankan yang mana diberikan kepada responden pertama. Perayu telah memperolehi penghakiman bagi tindakan jaminan ('tindakan jaminan') terhadap responden kedua dan keempat dan kemudiannya meneruskan dengan tindakan kebankrapan. Responden-responden juga memfailkan tindakan terhadap perayu ('Guaman 207') dan dalam menjawab, perayu memfailkan notis permohonan untuk membatalkan writ dan pernyataan tuntutan responden-responden berikutan A 18 k 19(1)(b), (c) dan/atau (d) Kaedah-Kaedah Mahkamah 2012. Mahkamah Tinggi menolak notis permohonan oleh perayu, maka rayuan ini. Isu-isu yang dibangkitkan oleh perayu adalah sama ada responden pertama mempunyai kapasiti dan locus standi untuk memulakan tindakan tersebut; dan sama ada responden-responden diestop daripada meneruskan dengan Guaman 207

kerana res judicata atau estopel mutlak. A

Diputuskan, membenarkan rayuan dengan kos:

(1) Apabila writ dan pernyataan tuntutan difailkan pada 23 Februari 2011 dalam Guaman 207, tidak terdapat sanksi yang diperolehi responden pertama. Sanksi hanya diperolehi pada 3 Jun 2015, selepas pemfailan writ dan pernyataan tuntutan. Mengambil kira fakta bahawa sanski tersebut hanya dperolehi selepasa guaman telah difailkan, responden pertama tidak mempunyai kapasiti untuk memulakan Guaman 207. Sanksi tersebut diperolehi selepas pemfailan Guaman 207 tidak boleh dibuat kebelakangan (lihat perenggan 27, 34 & 48). B C

(2) Pernyataan tuntutan dalam kedua-dua tindakan jaminan dan Guaman 207 mendedahkan bahawa: (a) kedua-dua mempunyai siri fakta yang sama; (b) tindakan jaminan ditentukan selepas perbicaraan penuh berdasarkan atas meritnya selepas saksi-saksi memberi keterangan; (c) pihak-pihak dalam tindakan jaminan adalah sama seperti di dalam Guaman 207; dan (d) isu-isu dan perkara yang dibangkitkan di dalam Guaman 207 telah dibangkitkan dan dipertimbangkan didalam tindakan jaminan. Matriks fakta Guaman 207 dan tindakan jaminan menunjukkan kes yang biasa dan jelas terhadap kepelbagaian tindakan, yang mana adalah penyalahgunaan proses mahkamah. Pemfailan Guaman 207 menarik maksim res judicata. Secara keseluruhannya, Guaman 207 adalah remeh dan penyalahgunaan proses mahkamah dan oleh itu tidak dapat dipertahankan dan patut dibatalkan (lihat perenggan 40, 43 & 49–50).] D E F

Notes

For cases on application to strike out writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9357–9358. G

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Chee Pok Choy & Ors v Scotch leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd) H

Badiaddin bin Mohd Mahiddin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Datuk Ooi Han Eng & Anor v Soh Huang Siah (carrying on business through an organisation known as Alaric's Productions Co) [2010] 5 MLJ 665, CA (refd)

Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54, Ch D (refd) I

Henderson v Henderson (1843) 67 ER 313 (refd)

Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd [2013] 1 MLJ 406; [2012] 10 CLJ 88, CA (refd)

Joseph Paulus Lantip & Ors v Unilever PLC [2012] 7 CLJ 693, FC (refd)

A *Lim Foo Yong & Sons Realty Sdn Bhd v Datuk Eric Taylor* [1990] 1 MLJ 168, SC (refd)
Penang Port Commission v Kanawagi s/o Seperumaniam [2008] 6 MLJ 686; [2009] 1 CLJ 169, CA (refd)
Saunders (A Bankrupt), Re, Re Bearman (A Bankrupt), Re Bristol & West
B *Building Society v Saunders* [1977] Ch 60; [1977] 3 All ER 992 (refd)
Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1, FC (refd)
C
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1991] 3 MLJ 325; [1991] 1 CLJ Rep 436, SC (refd)
Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd [2014] 3 MLJ 1; [2014] 2 CLJ 1, FC (distd)
D *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)

Legislation referred to

E Companies Act 1965 (repealed by Companies Act 2016) ss 226(3), 233, 236(2), (2)(a), (3), 279
Contracts Act 1950 s 74
Rules of Court 2012 O 18 r 19(1), 19(1)(b), (1)(c), (1)(d)

F **Appeal from:** Civil Suit No 22NCVC-207 of 2015 (High Court, Shah Alam)

Nor Shadah bt Shaari (Shukor, Baljit & Partners) for the appellant.
Abdul Rashid Ismail (Thulasy Suppiah with him) (Rashid Zulkifli) for the respondents.

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Zabariah Mohd Yusof JCA:

[1] This is an appeal by the defendant, who is the appellant here, against the decision of the learned High Court judge who had dismissed the notice of
H application by the defendant to strike out the plaintiffs' (who are the respondents here) writ and statement of claim dated 15 April 2015 pursuant to O 18 r 19(1)(b), (c) and/or (d) of the Rules of Court 2012.

I Parties will be referred to, as they were in the court below.

[2] After hearing submissions from both parties we allowed the appeal with costs. Herein below are our grounds.

BACKGROUND

[3] The first plaintiff was appointed as the main contractor for Pembinaan BLT Sdn Bhd for the construction and completion of a Royal Marine base at Tanjung Pelepas, Johor Bahru, Johor for a contract sum of RM125m ('the project').

[4] To undertake the construction of the project, the first plaintiff obtained banking facilities from the defendant. As security, the first plaintiff executed the following documents:

(a) facility agreement dated 6 September 2007; and

(b) deed of assignment of contract proceeds dated 6 September 2007 ('deed of assignment').

[5] At the same time, a joint and several guarantee and indemnity dated 6 September 2007 was provided by the second to fourth plaintiffs ('guarantee').

[6] Pursuant to the banking facilities, on 20 October 2009, the first plaintiff applied to the defendant to pay the first plaintiff's subcontractor, Forest Point Sdn Bhd the sum of RM250,000 directly.

[7] However the defendant failed to pay Forest Point Sdn Bhd as directed. The reason being, due to a disputed deduction of legal fees which was incurred by the defendant as a result of an earlier civil litigation which involved the first plaintiff, second plaintiff and the defendant against Asian Minerals & Ores Pte Ltd.

[8] Due to the non-payment, the first plaintiff was wound up by Forest Point Sdn Bhd pursuant to Shah Alam High Court Winding Up Petition No 28–323 of 2010.

[9] Consequently, Pembinaan BLT Sdn Bhd terminated the first plaintiff as the main contractor for the project.

[10] At the same time, the defendant also terminated the banking facilities which were granted to the first plaintiff.

[11] Thereafter, the defendant commenced Civil Suit 22NCVC-915 of 2011, at the Shah Alam Court, against the second to fourth plaintiffs pursuant to the guarantee ('the guarantee action'). There was a full trial in respect of the

guarantee action and judgment was subsequently entered in favor of the defendant on 30 May 2014 by Yaacob bin Sam J. Following thereto, the defendant filed bankruptcy proceedings against the second to fourth plaintiffs. These bankruptcy proceedings are still ongoing.

[12] The plaintiffs then filed a civil suit (22NCVC-207 of 2015) against the defendant on 15 April 2015, ie the present civil suit ('Suit 207'). A notice of application to strike out under O 18 r 19(1) of the Rules of Court 2012 was filed by the defendant, which is the subject of the present appeal before us. Sanction from the official receiver was obtained by the plaintiffs on 3 June 2015 to proceed with this civil suit.

BASIS OF THE NOTICE OF APPLICATION TO STRIKE OUT BY THE DEFENDANT

[13] The defendant premised its application for the striking out of Suit 207 on the following grounds:

(a) that the first plaintiff, being a wound up company, does not have the capacity or the locus standi to institute Suit 207; and

(b) that the plaintiffs are estopped from pursuing Suit 207 by reason of res judicata/absolute estoppel.

[14] The application by the defendant was opposed by the plaintiffs and they maintained that Suit 207 was properly instituted and sanctioned by the official receiver and that res judicata was not applicable.

FINDINGS

Whether the first plaintiff has the capacity and locus standi to institute the action

[15] It was argued by the defendant that as the first plaintiff had been wound up on 23 February 2011 vide a Shah Alam court order in Suit No 28–323 of 2010, sanction had to be obtained before the first plaintiff institutes Suit 207 against the defendant. The facts showed that there was no prior sanction obtained by the first plaintiff from the official receiver before the filing of the said action. The entitlement of the first plaintiff in the writ and statement of claim as to its actual capacity and address of the receiving officer were not stated. To support its argument in this regard, the defendant relied on s 236(2)(a) of the Companies Act 1965 which states:

236 Powers of liquidator

(2) The liquidator may —

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company.

[16] The defendant also relied on the Court of Appeal case of *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406; [2012] 10 CLJ 88 where it had been held at pp 413–414 (MLJ), at pp 93–94 (CLJ) as:

> [15] Section 236(2) of the Companies Act 1965 strengthens the position that only the official assignee as the appointed liquidator has the power to bring or defend any action or other legal proceedings in the name and on behalf of the wound up company. If for whatever reason, the official assignee as the liquidator is unwilling to initiate the action in the name of the wound-up company, a creditor or a contributory can apply to the court under ss 236(3) or 279 of the Companies Act 1965 seeking an order that the liquidator be compelled to initiate the action in the name of the wound up company or that leave be given to the creditor or contributory himself to bring the action in the name of the company (see *Abric Project Management Sdn Bhd v Palmshire Plaza v Boustead Eldred Sdn Bhd*). Again to do so, the creditor or the contributory must have obtained leave of the court before commencing the action in the name and on behalf of the wound up company.
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> There is no evidence to show that the commencement of the present action by the appellant itself on 26 February 2009 was done with the knowledge and authority of the official assignee as the liquidator. Clearly, the appellant or its shareholders or directors cannot usurp the powers of the liquidator in initiating the present action against the respondent. The appellant cannot commence the action and then later after objections raised by the respondent, apply for leave or sanction from the official assignee. The authority given by the official assignee is dated 3 March 2011, more than two years and three months after action was filed in court. There are no provisions of law to authorise that leave or sanction of the official assignee is to have retrospective effect. The appellant lacks locus standi right from the time when the action was filed. Therefore the action was invalid and void ab initio. Subsequent leave or approval by the official assignee office which came more than two years later cannot legalise or validate an action which was invalid and void ab initio.

[17] Hence the defendant submitted that, the sanction obtained on 3 June 2015 after the filing of the writ and the statement of claim in Suit 207 dated 15 April 2015 was defective which rendered the writ and the statement of claim invalid and void ab initio.

[18] In opposing the application by the defendant, the first plaintiff relied on the Federal Court judgment in *Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd* [2014] 3 MLJ 1; [2014] 2 CLJ 1, where Mohamed Apandi Ali FCJ held

A at pp 10–11 (MLJ and CLJ):

[20] It was also argued by the applicant that by applying the doctrine of ratification, a subsequent sanction could only ratify the issue of locus standi. To see if such doctrine is applicable in this case, it is appropriate to see the actual 'sanction' given. The sanction as per the Director General of Insolvency's letter dated 19 August 2013, did not specify B that it is to be retrospective. For the doctrine of ratification to be applicable, the ratification must be clear. Furthermore, in the present case, there is no evidence to show that there is ever any application for the sanction to be retrospective. In *Re Saunders* (A Bankrupt), *Re Bearman* (A Bankrupt), *Re Bristol & West Building Society v Saunders* [1977] Ch 60; [1977] 3 All ER 992 Lindsay J held:

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> Given the practical inconveniences I have described the injustices that can be left without possible remedy if retrospective leave is in no case possible. I share with the Full bench in Lahore in 1942 the view that, if the section is capable of being read more than one way, there is no doubt which way entails the less injustice and inconvenience. If, as I hold, the words used are in their full historical context D fairly capable of bearing more than one meaning, it is legitimate for me to adopt a meaning which gives effect to the statutory purpose, rather than frustrating it, as in my view an inflexible powerlessness to give leave even in the most glaring of cases would do ...
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> ... Accordingly, I hold that leave may in appropriate circumstances be given E under s 285(3), notwithstanding that the proceedings in question have already been commenced.
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> ... As for the discretion, I have earlier mentioned that the trustees in bankruptcy do not oppose the granting of leave and that it has been conceded that if the jurisdiction exists the facts are such as to justify a grant of leave nunc pro tunc in F exercise of the discretion. I am satisfied that that is so and grant such leave.

[21] The issue of prejudice or miscarriage of justice does not arise in the circumstances, as the applicant, on its own accord, had failed to utilise the enabling provisions of the law to commence the impugned legal proceedings. The court, in law, is not in a position to render assistance to such litigant.

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[22] Following *Saunders*' case, we hold the view that in appropriate circumstances, which has to be proven, leave nunc pro tunc may be given under s 236(a) of the Companies Act subject to the discretion of the courts under s 236(3) of the Act. Such discretion and control by the court under s 236(3) is to be read together with s 226(3) of the Act. This is notwithstanding the fact that the proceedings had already H commenced.

[19] It was argued by the first plaintiff that the facts in the Federal Court case of *Winstech* can be distinguished from the Court of Appeal case in *Hup Lee Coachbuilders Holdings Sdn Bhd* wherein in *Hup Lee Coachbuilders Holdings* I *Sdn Bhd*, the parties concerned did not seek the sanction of the official receiver despite the directive from the court to file the application for sanction so as to

proceed with the case. Further *Winstech* is of higher authority than *Hup Lee Coachbuilders Holdings Sdn Bhd*, and was decided post *Hup Lee Coachbuilders Holdings Sdn Bhd*.

[20] The learned judge pointed out that in Suit 207, the first plaintiff had applied for sanction from the official receiver on 14 May 2015 and the official receiver replied on 3 June 2015 granting the required sanction. There was some error in respect of the details of the suit which was sanctioned by the official receiver whereby it was wrongly stated that it should be Kuala Lumpur High Court instead of Shah Alam High Court. However the learned judge did not find fault with the sanction given, as the official receiver had corrected it vide the official receiver's letter addressed to the plaintiff dated 7 July 2015.

[21] The learned judge referred to the case of *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 which sets the fundamental principle that 'once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the court to authorise other persons to conduct litigation in the name of the company'.

[22] Although the learned judge in the application proceedings for striking out in Suit 207, cited the cases as abovementioned, he failed to appreciate the facts in *Winstech*. The learned judge at the hearing of the notice of application for striking out in Suit 207 ended by saying that he was of the view that this is not a plain and obvious case that warrants the striking out by the first plaintiff for want of capacity and locus standi.

[23] However, if one were to peruse the judgment in *Winstech*, the court in *Winstech* did not at all depart from *Hup Lee Coachbuilders Holdings Sdn Bhd.* The Court of Appeal in fact recapitulated what was held in *Hup Lee Coachbuilders Holdings Sdn Bhd* that 'the sanction granted under s 236(2)(a) of the Companies Act 1965 to bring, defend any action or other legal proceedings in the name or on behalf of the company does not have a retrospective effect' (refer to para 19 of the said case).

[24] Further in *Winstech*, the court after perusing through the 'sanction' given by the director of insolvency in its letter, found that nowhere in the letter did it mention that the sanction was to have a retrospective effect, and there was no evidence to show that there was any application for the sanction to be made retrospective. The court further stated that for the doctrine of ratification to be applicable the ratification must be clear.

[25] Although the court in *Winstech* followed *Re Saunders (A Bankrupt), Re Bearman (A Bankrupt), Re Bristol & West Building Society v Saunders* [1977] Ch 60; [1977] 3 All ER 992, at the same time it was of the view that, only in appropriate circumstances, which had to be proven, could retrospective leave be given under s 236(2)(a) of the Companies Act 1965, subject to the discretion and control of the court under s 236(3) to be read together with s 226(3) of the same, notwithstanding that the proceedings have already commenced. That would only happen in very rare circumstances. This is evident from the opening words of Lord Lindsay J in *Re Saunders (A Bankrupt), Re Bearman (A Bankrupt), Re Bristol & West Building Society v Saunders,* where he said 'given the practical inconveniences I have described the injustices that can be left without possible remedy if retrospective leave is in no case possible ...'.

[26] Thus, it is not as a matter of right that sanction is to have retrospective effect. Even in *Winstech*, at the end of it, leave *nunc pro tunc* was not granted by the court as there was no material for the court to grant such leave to the applicant.

[27] When the writ and the statement of claim was filed on 23 February 2011 in Suit 207, there was no sanction obtained by the first plaintiff. Sanction was only obtained on 3 June 2015, post filing of the writ and statement of claim.

[28] We are of the view that the learned judge failed to appreciate the underlying facts in the case of *Winstech* and *Hup Lee Coachbuilders Holdings*. In *Winstech* the underlying facts were dissimilar to the facts in our case. In *Winstech*, the liquidator initiated the suit but did not get the sanction. In the guarantee action, it was the bank ('the defendant') which had initiated the action. In Suit 207, the liquidator must initiate the action, not the directors. Therefore the first plaintiff cannot get leave subsequently, as the first plaintiff has no capacity to initiate the action in the first place. In *Winstech* it was the liquidator that had applied for the sanction. The liquidator did not apply for it to be retrospective. In our present case ('Suit 207'), the official receiver should have come in to institute the action on behalf of the first plaintiff. None of the parties obtained leave from the court for contributories to institute the action in court. In the event the liquidator refused, then they could get a court order.

[29] Therefore, there cannot be a retrospective sanction, as the first plaintiff has no capacity to institute the action from the beginning.

[30] The statement of claim clearly averred that the second to fourth plaintiffs instituted the action in their capacity as directors of the first plaintiff. However, as the first plaintiff had been wound up, the second to fourth

plaintiffs being directors have limited residual powers. The powers to conduct the affairs of the wound up company, including the power to institute legal proceedings is vested in the liquidator. *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 clearly outlined the fundamental principle that once a company is in liquidation its assets and liabilities vest in the liquidator. It is left to the liquidator as to how to proceed with any legal proceedings (s 233 of the Companies Act 1965 refers).

[31] Following thereto, the affidavits deposed by the first plaintiff in reply to the notice of application in the striking out in Suit 207 are also defective, as only the liquidator has the capacity to depose the affidavit for and on behalf of the first plaintiff which had been wound up as stipulated under s 236(2) of the Companies Act 1965.

[32] Further, the reliefs prayed for by the second to fourth plaintiffs were for their losses in their personal capacities. The second to fourth plaintiffs were never parties to the facility agreement and hence could not have incurred any loss or damage as averred in their statement of claim. Section 74 of the Contracts Act 1950 envisages compensation for loss or damage caused by the breach of contract entered into between parties. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Support for such proposition is found in *Lim Foo Yong & Sons Realty Sdn Bhd v Datuk Eric Taylor* [1990] 1 MLJ 168, where the court held that:

> (1) Only a party to a contract or his estate is entitled to compensation for loss or damage caused by the breach of contract under s 74(1) of the Contracts Act 1950. In this case Datin Peggy Taylor, as administrix of the estate of her deceased husband, could prove and obtain compensation for the loss suffered by the deceased or his estate but not for loss suffered by her in her personal capacity.

[33] The second to fourth plaintiffs are seeking the prayers in the relief sought, premised upon the fact that the first plaintiff is not liable, hence they could not be made liable. They are effectively seeking to extinguish the judgment of Yaacob bin Sam J obtained in the guarantee action in the Shah Alam Court dated 30 May 2014. However, it is a fact that the said judgment is still valid and was never set aside. The guarantee action was decided after a full trial and hence any dissatisfaction on the said judgment ought to have been brought up in an appeal. Parties cannot apply before another court of co-ordinate jurisdiction to set aside or 'extinguish' the said judgment, as the court was already functus officio, save and except on the issue of illegality or lack of jurisdiction (refer to *Badiaddin bin Mohd Mahiddin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1). Clearly, in this respect, the relief prayed for, by the second to fourth plaintiffs is an abuse of the courts' process.

[34] Therefore in view of the fact that the sanction was only obtained after the suit had been filed, the first plaintiff has no capacity to institute this suit. The sanction obtained subsequent to the filing of Suit 207 cannot be made retrospective.

Res judicata/absolute estoppel

[35] It is the contention of the defendant that the suit herein ought to be struck out premised upon the principle of res judicata/absolute estoppel. It was contended that the defendant had already pursued and obtained judgment against the second to fourth plaintiffs in the guarantee action.

[36] The defendant submitted that the writ and the statement of claim in the guarantee action consisted of the same parties and was premised upon the same facts as Suit 207. The principle of res judicata as stipulated in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 applies.

[37] To oppose the argument by the defendant, the first plaintiff submitted that the first plaintiff was never a party to the guarantee action. In addition, the second to fourth plaintiffs submitted that they are claiming against the defendant in their capacity as directors and shareholders of the first plaintiff who were required to give guarantees to the defendant in consideration of the granting of the banking facilities to the first plaintiff. It was submitted that the second to fourth plaintiffs have residual powers to act on behalf of the first plaintiff following the case of *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325; [1991] 1 CLJ Rep 436. The second to fourth plaintiffs also relied on the case of *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54.

[38] The plaintiffs further contended that the learned judge in the guarantee action did not adjudicate on the following issues which were pleaded by the second to fourth plaintiffs, ie:

(a) the unauthorised deduction of the disputed legal fee by the defendant; and

(b) the failure of the defendant to pay Forest Point Sdn Bhd,

which resulted in the first plaintiff being wound up by Forest Point Sdn Bhd.

[39] The learned judge in Suit 207 when hearing the striking out application by the defendant was not convinced that this case was obviously unsustainable due to the maxim of res judicata. He referred to the case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 at p 357 where Gopal Sri Ram

JCA quoted the case of *Henderson v Henderson* (1843) 67 ER 313 where Wigram VC said at p 319:

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ...
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> Pausing for a moment, I think that it is essential to bear in mind that Wigram VC spoke these words in the Court of Chancery, and that the court he referred to was that court of which he was the Vice Chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of res judicata has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.
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> Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.
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> In *Carl-Zeiss Stiftung v Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:
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> > As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick case* [1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21). All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

The learned judge was of the view that premised on the cases cited, and in the interest of justice, the plaintiffs should be accorded the right of the opportunity to ventilate their case at a full trial, as justification for him in not striking out the case.

A However, from the grounds of the learned judge, we are of the view that there has been no judicial appreciation of the facts of the guarantee action and Suit 207. Our reasons are as follows:

B **[40]** A perusal of the statement of claim in the guarantee action and in Suit 207 disclosed that:

(a) both consisted of the same series of facts;

(b) the guarantee action was determined after a full trial based on its merits after witnesses gave evidence. The grounds of judgment of the Yaacob Sam J in the guarantee action disclosed that there was evidence led by PW1 in examination-in-chief, cross-examination and re-examination on:

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(i) the issue of RM3.3m from Pembinaan BLT Sdn Bhd;

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(ii) the issue of the legal fee of RM600,000;

(iii) issue on the debt owing to Forest Point Sdn Bhd in the amount of RM250,000; and

E (iv) all the documents referred to in the guarantee action are the same as in the documents in Suit 207;

(c) the parties in the guarantee action are the same as in Suit 207; and

(d) the issues and the subject matter raised in Suit 207 (with regards to the issue of the amount of RM3.3m of debt from Pembinaan BLT Sdn Bhd, the issue of the legal fee of RM600,000, the issue of the debt owed to Forest Point Sdn Bhd in the amount of RM250,000) have been raised and considered in the guarantee action (refer to pp 341–381 of the records of appeal *Jld* 2(3)).

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[41] It has been established in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 that a matter or issue which had been adjudged and litigated, created an estoppel per rem judicature. The effect is that parties and their privies are not allowed to litigate again on the same matter as the judgment becomes the truth between the parties. The rationale is that it is in the public interest that there should be finality in litigation and that parties should not be vexed twice for the same causes of action. The maxim also applies to issues or causes of action which should have been raised in the original action which resulted in the final judgment. This has been aptly explained in the case of *Henderson v Henderson* (1843) 67 ER 313 which is:

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> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and

> pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.
>
> ...
>
> In order to prevent multiplicity of actions and also in order to protect the underlying rationales of estoppel per rem judicatum and not to act against them, such estoppel of cause has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not either deliberately or due to inadvertence.

These principles have been applied in the case of *Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686; [2009] 1 CLJ 169, *Joseph Paulus Lantip & Ors v Unilever PLC* [2012] 7 CLJ 693, *Datuk Ooi Han Eng & Anor v Soh Huang Siah (carrying on business through an organisation known as Alaric's Productions Co)* [2010] 5 MLJ 665 and *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413.

[42] The learned judge in Suit 207 referred to the case of *Chee Pok Choy & Ors v Scotch leasing Sdn Bhd* [2001] 4 MLJ 346 at p 357 where Gopal Sri Ram JCA quoted the case of *Henderson v Henderson* (1843) 67 ER 313 wherein Wigram VC said 'since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result'. It was with that in mind that the learned judge refused to strike out the case and said that parties should be given the opportunity to ventilate the issues at full trial.

However, what is pertinent to note that, nowhere in the judgment of the learned judge in Suit 207 did he allude to the facts which could lead to an injustice to the parties if the doctrine is applied. Neither was it shown to the court that an unjust result would occur if and when res judicata is applied.

[43] In fact the factual matrix of Suit 207 and the guarantee action provide a plain and clear case of multiplicity of actions, which is an abuse of the court's process.

The bankruptcy action

[44] A final subsidiary point raised by the defendant was that the present action commenced by the second to fourth plaintiff is an abuse of process in an attempt to thwart the bankruptcy proceedings which were brought by the defendant against the plaintiffs pursuant to the guarantee action.

[45] The learned judge was of the view that this ought to be dealt with in the bankruptcy action. We are of the view that it need not be so.

[46] The second to fourth plaintiffs have commenced their action in the writ action and statement of claim in Suit 207 only after the bankruptcy action was filed against them. It is to be noted that judgment in the guarantee action was obtained on 30 May 2014. The bankruptcy notice was dated 28 August 2014 and it was served on the plaintiffs on 12 February 2015. The plaintiffs filed their affidavits asserting that there existed a counter claim against the defendant on 13 April 2015 when served with the bankruptcy notice. Subsequently the writ and statement of claim of Suit 207 was filed on 15 April 2015. Clearly, the counterclaim by the plaintiffs was filed only after the bankruptcy notice was served. The plaintiffs could/should have raised their counterclaim in the guarantee action, which they failed to do. Raising it for the first time in Suit 207, and only after the bankruptcy notice was served on the plaintiffs, clearly smacks of mala fides and making use of the court process to justify their means to an end. The act of abuse cannot be clearer than this, ie an attempt by the plaintiffs to delay the enforcement of the judgment of the guarantee action.

[47] Therefore, there is no necessity to deal with this issue in the bankruptcy action as the court would be complicit with the purpose of the plaintiffs ie to delay the enforcement proceedings further. We are dealing with the present suit (Suit 207) and there is evidence of the court process being abused by the plaintiffs. It would serve the ends of justice for the court to deal with it in the present suit.

CONCLUSION

[48] Based on the aforesaid, the first plaintiff lacks the capacity and the locus standi to institute the present action (Suit 207) against the defendant. The sanction provided by the director of insolvency has no retrospective effect.

[49] Further, the present suit (Suit 207) provides a clear example of a duplicity of action to the guarantee action which had been determined to its finality based on merits by a court of competent jurisdiction. The judgment of the guarantee action is still valid and has never been set aside. Hence the filing of Suit 207 attracts the maxim of res judicata.

[50] Suit 207 is frivolous and an abuse of the court's process and is therefore unsustainable and should therefore be struck out.

[51] We therefore allowed the appeal with costs. The writ and statement of claim is struck out.

Appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar